No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, Trustee,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the Montana Dangerous Drug Tax, as applied to the Kurths, who have been previously convicted and punished for dangerous drug violations, violative of the Double Jeopardy Clause's prohibition against punishments for the same offense under the rationale of *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989)?

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The Respondents, Kurth Ranch, et al., ("Kurth") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 986 F.2d 1308 (9th Cir. 1993) and reprinted in Petitioner's Appendix ("P.A.") at 1.

STATEMENT OF THE CASE

The Kurth family was apprehended by law enforcement personnel for growing marijuana on their Montana farm. (P.A. 29). They were charged with criminal possession and sale of dangerous drugs and ultimately pled guilty to these charges. (P.A. 30). The state trial court imposed various sentences ranging from twenty years in the Montana State Prison, with ten years suspended, for Richard Kurth, to deferred sentences for others. (P.A. 30-32).

The State also prosecuted a civil forfeiture action which resulted in the confiscation of approximately $18,000 from the Kurths. (P.A. 34); *State v. $28,260.26 etc.*, No. DV-87-093 Judgment and Order of Forfeiture (Mont. 12th Dist. Ct., October 27, 1988). The State deposited these funds in the drug forfeiture accounts of the law enforcement agencies involved in the criminal proceedings. *Id.*

The State also, through the Petitioner, Department of Revenue ("D.O.R."), assessed a "tax" of nearly $800,000 against the Kurths and began collection proceedings through the administrative process. (P.A. 14-15, 34). The

basis for this "tax" is the Montana "Dangerous Drug Tax Act," MCA §§ 15-25-101-123 (1987). (P.A. 82).[1]

In September 1988, the Kurths filed a Chapter 11 bankruptcy petition automatically staying the administrative proceedings before the D.O.R. pursuant to 11 U.S.C. § 362(a). (P.A. 15). D.O.R. filed several proofs of claim with the bankruptcy court. *Id.* The ultimate amended proof of claim was for $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest. (P.A. 35).

The Kurths filed an adversary proceeding challenging D.O.R.'s amended proof of claim and the constitutionality of the Drug Tax Act. *Id.* The bankruptcy court, after a two-day trial, denied D.O.R.'s amended claim. (P.A. 25, 60).

The bankruptcy court determined, from the evidence presented, that D.O.R.'s tax on the marijuana plants and derivatives was arbitrary and capricious and therefore illegal. (P.A. 60). The court concluded that D.O.R.'s assessment on the remaining marijuana satisfied the requirements of the Drug Tax Act but, as applied to the Kurths, ran afoul of the Double Jeopardy Clause of the

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[1] This Act purports to establish "a tax on the [unlawful] possession and storage of dangerous drugs." MCA § 15-25-111(1) (P.A. 82). "[E]ach person possessing or storing dangerous drugs is liable for the tax" in an amount determined by the department. *Id.* The tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112 (P.A. 84). The burden of proof for an exception from the "tax" is on the person claiming it. *Id.*

United States Constitution, pursuant to *United States v. Halper*, 490 U.S. 435 (1989):

> The tax which I have found to be legally imposed pursuant to Drug Tax Statute on the possession of marijuana exceeds $208,150 (without interest). If D.O.R. were allowed to impose this tax, *without any showing of some rough approximation of its actual damages and costs* which it seeks to recover to make the State whole, I would . . . "be sanctioning the very type of 'clear injustice' which *Halper* prohibits," for, *on such state of this record*, the tax is punishing the debtors twice for the same criminal conduct.

In Re Kurth Ranch, No. 88-40629-11 (Bankr. D. Mont. May 8, 1990) (P.A. 58) (emphasis added).

D.O.R. appealed to the United States District Court. The district court affirmed the bankruptcy court, finding "[t]he order well-reasoned and supported by the evidence of the record:"

> As applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct. That fact, coupled with the D.O.R.'s failure to provide the Kurths or the Bankruptcy Court with an accounting of its actual damages or costs, leads to the inescapable conclusion that the subject tax assessments violated the double jeopardy clause of the Fifth Amendment.

In Re Kurth Ranch, No. CV-90-084-GF (D. Mont. Apr. 23, 1991) (P.A. 22) (emphasis added).

D.O.R. appealed to the Ninth Circuit only the district court's affirmance of the bankruptcy court's determination that the $208,150 tax on the harvested marijuana violated the Double Jeopardy Clause. (P.A. 4). In affirming the district court, the Ninth Circuit held that because D.O.R. refused to offer any evidence justifying the imposition of the tax on the Kurths, the tax, as applied to the facts of this case, violated the Double Jeopardy Clause:

> The Kurths were criminally prosecuted for possession and sale of dangerous drugs. The double jeopardy analysis under *Halper* applies. If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment.
>
> The record in this case, however, is devoid of the information necessary to make a determination of proportionality. *Despite opportunities to do so before the bankruptcy and district courts, Revenue refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects.*
>
> * * *
>
> *By refusing to offer any evidence justifying its imposition of the tax,* the State has failed to meet the threshold requirements under *Halper. We do not hold that the marijuana tax is unconstitutional on its face; we do hold it is unconstitutional as applied against the Kurths.* The tax assessment levied by Revenue in this case constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause.

In Re Kurth Ranch, 986 F.2d 1308, 1311-12 (9th Cir. 1993) (emphasis added); (P.A. 10-12). D.O.R.'s Petition for rehearing was denied. (P.A. 78).

SUMMARY OF ARGUMENT

The issue before this Court is not whether Montana's Drug Tax Act violates the Double Jeopardy Clause. The issue is whether a civil sanction assessed pursuant to that statute can constitute a second punishment prohibited by this Court's decision in *United States v. Halper,* 490 U.S. 435 (1989). The Ninth Circuit properly concluded, based upon the facts of this case, that D.O.R.'s $208,150 tax constituted a second punishment and is therefore barred by the Double Jeopardy Clause.

While the Ninth Circuit's opinion conflicts with the Montana Supreme Court decision of *Sorensen v. State Dep't of Revenue,* 836 P.2d 29 (Mont. 1992) that conflict is of little significance. To avoid future double jeopardy violations, D.O.R. must simply submit evidence to the trier of fact justifying that portion of the sanction that appears disproportionate to the government's damages – which D.O.R. refused to do in this case, despite the opportunity to do so before the trial court. This superficial conflict notwithstanding, the Montana Supreme Court's legal analysis ignored this Court's decision in *Halper* and was expressly disapproved by this Court in *Austin v. United States,* ___ U.S. ___, 61 U.S.L.W. 4811 (U.S. June 28, 1993).

Contrary to D.O.R.'s assertion, the Ninth Circuit's opinion is consistent with other decisions of this Court as well as other federal and state courts. These decisions recognize that drug taxes are civil sanctions and serve the purposes of retribution and deterrence.

Finally, only one other state court of last resort has considered the application of *Halper* to a civil sanction levied under that state's drug tax act. In *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992) the Illinois Supreme Court applied an analysis similar to the Ninth Circuit's in this case.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS LIMITED TO THE FACTS OF THE CASE AND HAS LITTLE, IF ANY, IMPACT ON THE ABILITY OF D.O.R. OR OTHER STATES TO LEVY OR COLLECT DRUG "TAXES."

The "central issue," according to D.O.R., "is whether the Montana tax on marijuana is a 'penalty' or 'punishment' for purposes of the double jeopardy clause of the Fifth Amendment." Brief for Petitioner 5-6, n. 3. This statement is misleading. It implies that the Ninth Circuit held that Montana's $100.00 per ounce sanction for unlawful possession of marijuana, on its face, violates the Double Jeopardy Clause. The Ninth Circuit did not, however, decide that question. Indeed, the Ninth Circuit refused to find Montana's Drug Tax Act unconstitutional "on its face." *In Re Kurth Ranch*, 986 F.2d at 1312. (P.A. 11).

Instead, the Ninth Circuit issued a narrow ruling based on the record before it: the $208,150 "tax" levied against the Kurths for unlawful possession of marijuana, following criminal punishment for the same conduct, was an impermissible second punishment when D.O.R. refused to offer evidence of any remedial purpose purportedly served by the sanction in question. *Id.* Recognizing the "intrinsically personal" nature of the protection against double jeopardy, the Ninth Circuit assessed the character of the sanction imposed by D.O.R. and, in light of the record, determined that it appeared to qualify as punishment in the plain meaning of the word. *See Halper*, 490 U.S. at 449.

D.O.R. makes this argument because, like the federal government in *Halper*, it resists a case-by-case analysis of the impact of a civil sanction on a person who has previously been subject to criminal prosecution for the same conduct. However, as this Court explained in *Halper*, when the Double Jeopardy Clause is implicated, there is no other alternative. The question is whether a particular person in a particular case has been subjected to "multiple punishments or repeated prosecution for the same offense." *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

In sum, the validity of Montana's Drug Tax Act is not at issue. Rather, it is the application of that statute, to the same conduct that formed the basis of the Kurths' prior criminal prosecution and punishment, that is the basis for the Ninth Circuit's decision. Because the "Double Jeopardy Clause protects against the *possibility* that the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding [,]" *Halper*, 490 U.S. at 450, n. 10 (emphasis

added), the Ninth Circuit properly applied *Halper* to the facts of this case.

D.O.R. correctly notes that the Ninth Circuit's decision conflicts with the Montana Supreme Court's decision in *Sorensen v. State Dep't of Revenue*, 254 Mont. 61, 836 P.2d 29 (1992). From a practical standpoint, however, this conflict is meaningless and will have little, if any, impact on the ability of D.O.R. or other state governments to levy "taxes" for illegal possession on dangerous drugs. Assuming a future tax "appears to qualify as punishment," *Halper*, 490 U.S. at 449, D.O.R. will simply have to submit evidence of its damages and costs to justify that portion of the sanction that in the trial court's discretion appears disproportionate to the government's damages – a result that is consistent with case law in at least two other states. *See Rehg. v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 539 (Ill. 1992); *State v. Riley*, 479 N.W.2d 234, 236 (Wis. Ct. App. 1991).

In any event, the Ninth Circuit correctly noted that the *Sorensen* decision "ignores the particularized double jeopardy inquiry required under *Halper*." 986 F.2d at 1312, n. 2. (P.A. 11). Moreover, the *Sorensen* court applied the wrong legal analysis when it relied upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980) to justify its decision that application of Montana's Drug Tax to a person previously punished for unlawful drug possession is not subject to analysis under *Halper*:

> "[t]he question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. *See Mendoza-Martinez*, 372 U.S. at 167, 184; *Ward*, 448 U.S. at 248. *In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-Martinez, and Ward." See e.g., United States v. Halper*, 490 U.S. 435, 447 (1989).

Austin v. United States, ___ U.S. ___, 61 U.S.L.W. 4811, 4813, n. 6 (U.S. June 28, 1993) (emphasis added); *cf. Sorensen*, 836 P.2d at 31-32 (P.A. 67-69).

Sorensen is also flawed because it recognizes no limit to the sanction the State of Montana could arguably impose in pursuit of its purported remedial purpose. In other words, there is nothing in *Sorensen* that suggests a line be drawn at $200.00 per ounce, $1,000 per ounce, or $10,000 per ounce of dangerous drugs. Arguably with each increase in the sanction D.O.R. could assert that the legislature's intent, by increasing the fine, was to recover more of the general costs allegedly caused by drugs in society. *Cf. Sorensen*, 836 P.2d at 31 (P.A. 68-69). Such an argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment. *Halper*, 490 U.S. at 451.

In sum, this Court's analysis in *Halper* carries with it an inherent limitation on the amount of sanction a government may impose in a second proceeding for the same conduct that resulted in a prior criminal punishment. In *Halper*, this Court ruled that the government may recover no more than "rough remedial justice." 490 U.S. at 446. Once the recovery exceeds that amount, which is left to

the trial court's discretion, the rationale for the civil sanction disappears and the sanction is simply a second punishment for the same offense for which the individual has already been punished. 490 U.S. at 450.

Here, the Ninth Circuit concluded that the trial court did not abuse its discretion when it found, on the basis of the evidence before it, that D.O.R.'s tax simply punished the Kurths a second time for illegal possession of marijuana. Because the Ninth Circuit's decision turned on the evidence before it, certiorari would be inappropriate. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court does not "grant certiorari to review evidence and discuss specific facts").

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS.

D.O.R. cites this Court to several federal court decisions upholding the validity of the federal marijuana tax.[2] None of the cases cited, however, concerned the issue of double jeopardy. Of significance, however, is *United States v. Sanchez*, 340 U.S. 42 (1950).

In *Sanchez*, this Court determined that the federal marijuana tax was a "civil sanction." 340 U.S. at 45 ("the [marijuana] tax can be properly called a civil rather than a criminal sanction"). Under *Halper* the issue is "whether

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[2] In *Leary v. United States*, 395 U.S. 6 (1969) this Court found the federal marijuana tax to violate the constitutional right against self incrimination. In 1971 Congress repealed this tax. Pub.L. No. 91-513.

a *civil sanction* in application may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 442 (emphasis added). Thus, *Halper* takes *Sanchez* one step further: When does a "civil sanction," like the federal marijuana tax in *Sanchez, in application*, constitute punishment for purposes of double jeopardy analysis? *Sanchez* and the other cases cited by D.O.R. did not consider that question.

Moreover, this Court and federal and state courts have explicitly noted that drug taxes, as civil sanctions, do not serve solely remedial purposes, but also serve the goals of deterrence and retribution. *See Leary*, 395 U.S. at 27 ("We think the conclusion inescapable that the [marijuana tax] statute was aimed at bringing to light transgressions of the marijuana laws"); *Sanchez*, 340 U.S. at 44 (noting the "penal nature" and "close resemblance to a penalty" of the federal marijuana tax act); *Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) ("we trust it quite plain that this [marijuana tax act] is a penal and not a revenue-raising statute") *cited with approval in Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978); *State v. Berberich*, 811 P.2d 1192, 1200 (Kan. 1991) ("[t]he minutes of the Kansas House and Senate Committees show that the primary purpose of the [drug tax] act was to combat drug usage . . . "); *State v. Durrant*, 769 P.2d 1174, 1181 (Kan. 1989) ("primary purpose" of Kansas drug tax statute "is to discourage or eliminate drug dealing"); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986) ("we believe the clear intent of [South Dakota's drug tax act] is to provide an extra penalty on possession of controlled substances through unconstitutional means").

In sum, drug taxes are civil sanctions that cannot be said *solely* to serve a remedial purpose but, instead, also serve retributive or deterrent purposes. Thus, the Ninth Circuit properly applied *Halper* to the facts of this case:

> A civil sanction that cannot be said *solely* to serve a remedial purpose but rather can be explained only as *also* serving *either* retribution or deterrent purposes is punishment as we have come to understand the term.

Halper, 490 U.S. at 448 (emphasis added); *cf. Austin*, 61 U.S.L.W. at 4815, n. 12 ("Under *United States v. Halper*, 490 U.S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion") (emphasis in the original).

In short, the Ninth Circuit's decision does not conflict with the decision of another United States Court of Appeals on the same matter. *See* Rule 10(a), Rev. Rules, S.Ct.

III. THE ONLY STATE COURT OF LAST RESORT TO ADDRESS HALPER'S APPLICATION TO DANGEROUS DRUG TAXES, ASIDE FROM MONTANA, REACHED A RESULT SIMILAR TO THE NINTH CIRCUIT.

In another misleading argument, D.O.R. asserts that the Ninth Circuit's Decision "Conflicts With Decisions of Other State Courts of Highest Appeal." Brief of Petitioner at 10-11. This argument is untrue. Of the six cases listed by D.O.R., only two originate from state courts of last resort, and of those two, only one decision, *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992), concerns the application of *Halper* to drug taxes and that decision is consistent with the Ninth Circuit's analysis here.[3]

In *Rehg*, the Illinois Supreme Court applied *Halper* to a drug tax assessment and concluded that a portion of the sanction ($168,000) "may be sufficiently disproportionate to the State's costs as to constitute a second punishment within the meaning of the double jeopardy clause." 605 N.E.2d 539. The court remanded the case to the district court for an accounting of the state's costs and damages – which D.O.R. refused to do in this case, despite the opportunity to present such evidence before the trial court. *In Re Kurth Ranch*, 986 F.2d at 1312 (P.A. 11); *see also In Re Kurth Ranch*, No. 88-40629-11 (Bankr. D. Mont. May 8, 1990) (P.A. 55-56).

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[3] The Kansas Supreme Court in *State v. Berberich*, 811 P.2d 1192 (Kan. 1991) did not address the issue of double jeopardy. Of the four decisions from intermediate courts of appeal in Alabama, Florida and Wisconsin, only one decision, *State v. Riley*, 479 N.W.2d 234 (Wis. Ct. App. 1991), addressed the issue of double jeopardy. There, the Wisconsin Court applied *Halper* to the facts before it and upheld the tax. The court stated, however, that "in some cases . . . an accounting may be required." 479 N.W. 2d at 236. *Harris v. State Dep't of Revenue*, 563 So.2d 97 (Fla. Dist. Ct. App. 1990) did not concern double jeopardy. *Hyatt v. State Dep't of Revenue*, 597 So.2d 716 (Ala. Civ. App. 1992) involved separate prosecutions by the federal and state governments, thus double jeopardy was not an issue. In *Briney v. State Dep't of Revenue*, 594 So.2d 120 (Ala. Civ. App. 1991) the opinion is unclear whether the defendant was criminally prosecuted, and if so, by which sovereign.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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